IN THE

Supreme Court of the United States

October Term, 1976

No. 76-669

WILLIAM MESHRIY and
MURSELL MESHRIY, his wife,
Petitioners,

v.

SUN OIL COMPANY,
a New Jersey corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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William Meshriy and Mursell Meshriy, his wife, the petitioners, prayed that a writ of certiorari be issued to the Michigan Supreme Court (the highest court of Michigan in which a decision can be had) to review an order denying the petitioners leave to appeal (and in effect finally affirming) a judgment of the Michigan Court of Appeals.

Respondent opposes the granting of certiorari for (1) The issue was not presented in the original pleadings. All the evidence was entered and the trial ended. Petitioner then, for the first time, raised the issue in a pleading upon which the instant petition for certiorari is requested.

(2) It is not meritorious.

(3) It presents no substantial Federal question.

OPINIONS AND ORDERS BELOW

The order of the Michigan Supreme Court denying the petitioners leave to appeal is printed in Appendix A, Pages 1a-2a. (The Appendix is a part of petitioners' application)

The opinion of the Michigan Court of Appeals, whose judgment finalized and affirmed in effect by the Michigan Supreme Court herein sought to be reviewed, is printed in Appendix B, Pages 2a-6a, and is reported at 67 Mich. App. 709 (1976). (No unofficial report citation as yet)

The order of the Michigan Court of Appeals denying the petitioners' application for rehearing is printed i. Appendix C, Pages 6a-7a.

The opinion and judgment of the trial court of first instance are printed in Appendix D and in Appendix E, Pages 8a-11a, and Pages 11a-12a, respectively.

The pertinent pre- and post-judgment orders of the trial court of first instance are printed in Appendix F and in Appendix G, Pages 12a-13a and Pages 13a-14a, respectively.

JURISDICTION

The petitioners' application for leave to appeal was denied by the Michigan Supreme Court on August 18, 1976 (Appendix A, Pages 1a-2a). The judgment of the Michigan Court of Appeals was entered March 9, 1976 (Appendix B, Pages 2a-6a). The petitioners' application for rehearing was denied by the Michigan Court of Appeals on April 30, 1976 (Appendix C, Pages 6a-7a). The purported jurisdiction of this Supreme Court to issue the requested writ of certiorari is conferred by 28 U.S.C. §1257(3).

However, petitioner's assertion based upon 28 U.S.C.A. 1257(3) brought in the due process question for the very first time *after the trial was completely over.* (Emphasis supplied) At no time did it appear in the original pleadings, namely, Complaint, Answer, Reply or Motions until the issue of rendering a decision was made as a result

of the letter set forth in petitioners' Appendix H, Pages 14a-16a. Hence, it was not timely raised. However, again it is reiterated that none of the pleadings contain a due process question until after the trial was completely over.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I.

Does the subject matter of the appeal involve a legal principle of major significance to the jurisprudence of the State of Michigan or of the United States?

Plaintiffs-appellants contend the answer should be "Yes".

Defendant-appellee contends the answer is "No".

The Court of Appeals did not so consider this but stated that the issue raised is "whether the trial court was so prejudiced by a witness's letter, which was critical of the court, that the plaintiffs were thereby denied a fair trial in a fair tribunal as required by due process of law." (Paragraph 2, Page 2, of Court of Appeals Opinion). This letter appears in Petitioner's Appendix H, Pages 14a-16a.

II.

Is the decision of the State Court of Appeals in conflict with decisions of this Supreme Court and does it raise a Federal Question?

Plaintiffs-appellants contend the answer should be "Yes".

Defendant-appellee contends the answer is "No".

A CONSTITUTIONAL PROVISION IS NOT INVOLVED

This case does not involve the Due Process Clause of the first section of the Fourteenth Amendment to the Constitution of the United States.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

> citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property with due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The Counter Statement of the case which follows shows that the issue actually is: Was the Circuit Trial Judge forced to make a decision in favor of defendant simply because of a letter written to the Michigan Supreme Court after the trial was over by a witness begging for a decision either way—either he was a forger and a perjurer or he was not?

COUNTER-STATEMENT OF THE CASE

Plaintiffs filed, on April 17, 1968, their equitable action in the Macomb Circuit requesting a rescission of a certain lease containing an option to purchase. William Meshriy and Marsell Meshriy, plaintiff, owned the real estate and the lessee was the Sun Oil Company. The attorney was Wilson M. Jackson of Roseville, Michigan.

On September 21, 1970 plaintiffs filed an Amended Complaint with no objection being made by defendant.

The pre-trial deposition of Walter C. Mason, an ex-employee of Sun Oil Company, was taken by another attorney, Mr. Walker Saunders.

The case was tried by Robert J. Lord, Esq., for the plaintiffs.:

The issues may be summarized from the Amended Complaint, Answer, and simplified as follows:

(1) Did Walter C. Mason sign Mrs. Meshriy's name to a 15-year lease with a rental of $800 per month, the right to renew for three consecutive five-year periods at

$850 rental per month or instead of renewing, at the end of ten years, at defendant's option, purchase the northwest corner of Gratiot and Twelve Mile Roads for $175,000?

(2) Were the initials which appeared in the lease forged initials?

(3) Was the typed-in rental amount of $800 and $850 renewal to average out for the entire period, including renewals, for the sum of $1200 per month?

Mathematically the lease with option to purchase shows that plaintiffs would have received as rent $800 per month for fifteen years which amounted to $144,000. If the three five-year options were exercised, by defendant, this would have yielded an additional $153,000 or a total rental for thirty years of $297,000. These executed leases required defendant to demolish the existing station and restaurant, to build a new station, and to pay all insurance and taxes, except special assessments.

Previously, Mr. Meshriy delivered to Mr. Mason an offer to sell to Sun Oil the existing site for $99,990. However, Mr. Mason did not bother sending the purchase agreement to the home office of Sun Oil Company because "Mr. Meshriy informed me that his wife's signature was not a legal signature and that he had signed her name to it."

Dividing the total (net-net) rent for thirty years, results in dividing $279,000 by 360 months, or averaging $825 per month (net-net). The lease, in addition, had the option to purchase at the end of ten years for $99,990. Eventually, a lease was executed for $800 per month for 15 years, an option to renew for three five-year periods, with an option to purchase for $175,000. Again, it was a "net-net" lease.

The lease had typed in the name of the individuals and

the witnesses thereto. Apparently, William Meshriy's name was written thereon (which he has never denied), but the name of his wife, plaintiffs specifically complain, was written in by Walter C. Mason, then the employee of Sun Oil Company. The witnesses to the document were Walter C. Mason as to Mrs. Meshriy's signature, and his wife Anna Mason, witnessed Mr. Meshriy's signature. The reason was that the Mason's residence at which Mr. Meshriy signed was very near the Meshriy's home, so that Anna Mason could witness Mr. Meshriy's signature. The document was notarized by Walter C. Mason.

The lease was dated September 27, 1966.

The Sun Oil Company tore down the combined existing service station and restaurant and at its own cost, constructed a new retail Sun outlet. It also paid $800 per month, from October 27, 1966, to April 17, 1968, *being approximately 18 months, without any objection from the plaintiffs*, even though the instant Complaint was filed on April 17, 1968 in the Macomb Circuit Court asking for reformation and rescission. In fact, the situation *at present* in 1976 is that Sun Oil is still paying $800 per month "net-net", namely, that Sun Oil is paying the Meshriys, who have always accepted it, the sum of $800 per month plus all taxes and insurance, but not special assessments.

On March 17, 1971, the trial before the Honorable Frank Jeannette commenced by plaintiffs calling Walter C. Mason as an ex-employee of the opposite party as an adverse witness. The attorney for defendant became ill that day, and the trial had to be adjourned. It was further adjourned because of the death of defendant attorney's wife.

On October 15, 1971, the trial proofs were concluded. Between the conclusion of the trial proofs and January

28, 1972, the Circuit Judge asked for the aid of a polygraph examiner. *Defendant's counsel* cited every Michigan case, civil and criminal, reported to that day, wherein a polygraph opinion was excluded; nevertheless, the judge was very anxious *because he could not make up his mind as to which side was telling the truth.* (Emphasis supplied) Therefore, it was ordered that the Chicago firm of Reid & Cummins would be contacted in order to fly an examiner to Detroit to administer the tests to Mrs. Meshriy and Mr. Mason. On January 28, 1972, after many hours of testing, in the Macomb County Courthouse, the polygraph examiner, Mr. Robert Cummins, completed the tests. He testified under oath that Mr. Mason was telling the truth and Mrs. Meshriy was not telling the truth. The Statement of Facts by Petitioners herein neglects to point out that on October 11, 1972, the court said:

> "It's further ordered counsel shall be afforded to have an opportunity to cross-examine Robert C. Cummins."

The Court further said to Mr. Lord:

> "Because I thought that you wanted to avail yourself to cross-examine Mr. Cummins. Now, do you or don't you?"
>
> Mr. Lord: "No"
>
> Herein the due process claim was forfeited, if one existed.

On January 29, 1973, plaintiffs, without a judgment having been entered, filed their motion for a new trial, citing that the trial judge under these circumstances could not enter a disinterested and impartial judgment pursuant to due process. *This was the first time a federal claim was raised.*

On April 16, 1973, Judge Jeannette heard and granted

the motion for a new trial. The Order granting a new trial was entered on May 14, 1973.

Further, the pleadings and the docket entries in this case indicated that plaintiff desired the cross-examination of Salvator Crimando, the Macomb County Court Administrator, and Robert E. Childs, attorney for defendant. This particular demand as well as the demand for cross-examination of Mr. Cummins, the polygraph operator, was never done though certainly it could have been arranged. This is the reason why the Honorable Frank Jeannette was really angry about the delays of 14 months in proceeding with this particular case.

On August 30, 1973, Walter C. Mason (who had been cross-examined as an agent of defendant-appellee, without notice to plaintiffs-appellants or counsel for the defendant, forwarded his letter to the late Chief Justice Thomas Kavanagh, complaining against the trial judge for not rendering an opinion. This letter is printed on petitioners' Appendix H, Pages 14a-16a. This apparently is the only due process issue.

September 4, 1973, the Deputy Supreme Court Administrator forwarded the Mason letter and an accompanying investigatory letter tc the Macomb County Court Administrator. (See Appendix I, Pages 16a-17a)

September 26, 1973, the trial judge met with counsel in chambers which was the first time Respondent's counsel heard of it and the following events transpired as described in Paragraph 12 of the December 7, 1973, affidavit in support of plaintiffs-appellants' December 10, 1973, second motion for a new trial (repeating plaintiffs' words):

> "On September 26, 1973, the Honorable Frank E. Jeannette met with counsel of the parties in chambers with the Macomb County Court Administrator pres-

> ent for reasons unknown to plaintiffs' counsel until the Honorable Frank E. Jeannette, without disclosing a copy thereof, stated that he was disturbed concerning a letter of complaint by said Walter C. Mason and that he was considering *sua sponte* setting aside the May 14, 1973 order granting plaintiffs a new trial, the Honorable Frank E. Jeannette otherwise saying in regard thereto that he had been 'sold a bill of goods,' the said meeting with the Honorable Frank E. Jeannette otherwise being confused, abruptly terminated when the Honorable Frank E. Jeannette left his chambers in a matter of only a few minutes, and otherwise inconsequential except for the disturbed appearance of the Honorable Frank E. Jeannette and a statement by the defendant's attorney that said Walter C. Mason was "out of control" or some such phrase; and the Honorable Frank E. Jeannette did not advise plaintiffs' counsel that he was considering *sua sponte* setting the May 14, 1973 order for new trial aside for the reason that no further information could be gained by another trial or that he had the benefit of months and seemingly years of the trial of this action or that he must arrive at a decision, as such matters are referred to by the Honorable Frank E. Jeannette in his November 1, 1973 opinion." (December 7, 1973 affidavit in support of plaintiffs' appellants' motion for new trial filed December 10, 1973.) (Case filed April, 1968)

September 26, 1973, the trial judge entered his Order adjourning the trial in this action to the next trial call for the reason that a criminal jury trial was in progress. (See Appendix J, Pages 16a-17a)

September 28, 1973, the Macomb County Court Administrator forwarded his response to the Deputy Supreme Court Administrator's investigatory letter of September 4, 1973. (See Appendix K, Pages 19a-20a)

On November 2, 1973 the trial judge filed his opinion for defendant dated November 1, 1973. (See Appendix D, Pages 8a-11a)

A Final Judgment for defendant was filed on November 19, 1973 with the necessary proof of service on plaintiffs' attorney, per G.C.R. 812.1(c). (See Appendix E, Pages 11a-12a)

The Order denying Motion for new trial and affirming the November 19, 1973, final judgment for defendant was entered on April 21, 1975. (See Appendix G, Pages 13a-14a) On May 12, 1975 the Claim of Appeal was filed.

On March 9, 1976 the Court of Appeals Opinion written by Presiding Justice Danhof, with Justices V. J. Brennan and M. J. Kelly concurring, held entirely in favor of Judge Jeannette's decision and final order and entered judgment for defendant. (See Appendix B, Pages 2a-6a)

It should be noted that plaintiffs-petitioners also applied for a rehearing. The matter was noticed for hearing on April 13, 1976, being dated March 29, 1976.

Defendant's counsel promptly filed an Answer in Brief in Opposition to Application for Rehearing.

The Court of Appeals denied the application for rehearing on May 4, 1976.

Thereafter plaintiffs-appellants, now with a fourth attorney for the plaintiffs added in this litigation, namely, Mr. Victor Hanson, filed their application to the Michigan Supreme Court for leave to appeal to which was attached a Brief in support thereof.

Defendant's Brief is to refute the arguments contended for (and frankly which counsel for defendant has extreme difficulty in following said argument and hence, the background as to the Counter-statement of Facts and the Counter-statement of Questions).

The mailed opinion from the Clerk of the Court of Appeals, Page 2, first paragraph states:

> "The plaintiffs have raised three issues on appeal[2]. For obvious reasons responding to the third issue answers the first two. *Any issues not expressly abandoned on appeal by the above actions of the plaintiffs will be considered abandoned in any event because plaintiffs have neither raised nor briefed and supported further issues.*" (Citing three cases) (Emphasis supplied)

However, in the revised or Counter-Statement of Questions involved, defendant-respondent prefers to restate the three issues as they are set forth in the Counter-Statement of Questions Involved in question form and in statement form in the argument which now follows: Actually, was the trial judge under these facts frightened into a decision because of a letter to the Michigan Supreme Court by a non-party witness for defendant after the trial was completed? The witness was disturbed to be branded a liar and a forger and simply requested the judge to say publicly whether or not the judge thought him to be a forger and perjurer.

ARGUMENT IN OPPOSITION TO PETITIONERS' APPLICATION FOR CERTIORARI

I.

THE SUBJECT MATTER OF THE APPEAL DOES NOT INVOLVE A LEGAL PRINCIPAL OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THE STATE OR THE UNITED STATES.

Defendant-respondent agrees that a fair trial in a fair tribunal is a basic requirement of the due process clause

of the 14th Amendment. No facts are actually set forth in the Application for Certiorari, but only generalizations and lists of cases and citations without an analysis of their factual content in order to show wherein a federal question is involved.

In this Application for Certiorari the petitioners-appellants rely upon mere citation and generalizations without any logical analysis.

Because counsel has simply stated in their Brief generalizations, the attorney for defendant-respondent feels that an analysis as to factual content of each of the cases cited is important to show how irrelevant they are to the present Petition for Certiorari.

In Re Murchinson, 349 US 133, 75 S St. 623 (1955), was a case wherein a Detroit Police Officer was cited for contempt by a judge-one-man grand jury. The judge was the complaining witness. The court held that it could not have been an impartial tribunal because of the fact that he had pre-determined that the man should be cited for contempt and hence, could not preside over the contempt trial of defendant and petitioner Murchinson.

Petitioners cite *Tumey* v *Ohio,* 273 US 510, 532, 47 S Ct 437 (1927).

Mr. Chief Justice Taft delivered the opinion of the court wherein the mayor of the village presided over trials of a person accused of violation of the state's prohibition act. The statute of Ohio provided that money paid from the fines shall go one-half to the state treasury and one-half to the municipality. In addition, a local ordinance of the village of North College Hill, Ohio, provided that one-half of all of the fines from the State of Ohio Prohibition Act shall be used to enforce the Act, that arresting officers

were allowed a percentage and that "the mayor (judge) of the village of North College Hill, Ohio, shall receive or retain the amount of his costs in each case in addition to his regular salary, as compensation for hearing such cases." If he heard these cases and found for the defendant, no fees or costs would be paid him. The defendant had to be convicted. Otherwise the mayor-judge received nothing. Obviously this was contrary to due process. Such procedure led to the infamous "JP" judgment for the plaintiff. Such a case results in a violation of the Fourteenth Amendment because the mayor-judge had a definite pecuniary interest in convicting the defendant. In citing this case, counsel for the defendant-appellee need ask its relevancy only by asking this question: Wherein did the Honorable Macomb County Circuit Judge Frank Jeanette get a part of any of the proceeds whether paid to any of the parties, the witnesses or counsel therein? The answer is obvious, so obvious that it indicates no substantial federal question being presented because obviously not one cent could ever have been paid or would this Honorable man ever accept any such sum. The very implication in the Petitioner is one which is appalling to defendant's counsel.

In re Oliver, 333 US 257, 68 S Ct 499 (1948), (p. 11 of Petition for Certiorari) was certiorari from denial of a Writ of Habeas Corpus. Oliver had been subpoenaed as a witness to testify before a Michigan "one-man grand jury". The Circuit Judge, sitting as the one-man juror, said that Oliver had testified "evasively" and given "contradictory answers" to questions. Without referring it to anyone else, he summarily sentenced him to jail in the secrecy of the grand jury chambers. The witness had no opportunity to defend himself, no kind of notice nor trial at all. Again this case differs from the instant proceedings

in that here there had been a complete trial with a complete right of cross-examination by plaintiffs' attorney, asked of the Court Administrator, of defense counsel and of the chief witness for defendant, the ex-employee of Sun Oil Company, Walter C. Mason, but never availed of even 14 months after the trial had concluded. Had the court simply read the pleadings and then entered the judgment it did, the cases might be analagous. Under the facts, and in accordance with petitioners' argument, due process must be based upon the facts as found, hence the case of *In re Oliver* is not pertinent to the present inquiry. Judge Jeannette was trying to render a worthy decision on only one issue: with each party represented, thorough cross-examination of all witnesses, with plaintiffs having the burden of proof, was Mrs. Meshriy or Mr. Mason telling the truth? This is not a federal question.

Petitioners cite on their Page 11 *Offutt* v *United States,* 348 US 11, 75 S Ct 11 (1954). This was a case in which defense counsel in a U.S. District Court sitting in the District of Columbia apparently had a personal animosity to the trial judge which was most certainly reciprocated. In fact, when he charged the jury the judge said:

> "I also realize you had a difficult and a disagreeable task in this case. You have been compelled to sit through a disgraceful and disreputable performance on the part of the lawyer who is unworthy of being a member of the profession; and I, as a member of the legal profession blush that we should have such a specimen in our midst."

The trial judge sentenced defense counsel to 10 days for contempt. The Court of Appeals, because of the bad attitude of both judge and counsel, reduced it to 48 hours. The U.S. Supreme Court held, in reversing, that the Chief

Judge of the District should assign another judge to sit in the second hearing on the charge for contempt. Messrs. Justices Black and Douglas insisted that he was entitled to a jury trial. Justice Reed and Burton dissented and would affirm the Court of Appeals; Mr. Justice Minton would affirm because of the fact that the Court of Appeals, having reduced the sentence, their actually being a finding of contempt by both Appellate Courts, would dismiss the writ of certiorari as improvidently granted.

Meshriy v *Sun Oil Co* was not a running battle between the bench and bar. Far from it. In fact, this counsel feels that the judge leaned over backwards to both members of the bar trying the case for the purpose of seeing that both parties were treated properly. He realized the peculiar position of both attorneys as well as of his own because of deaths and illnesses. This counsel can do nothing but express appreciation rather than condemn the trial judge as one who would be influenced by a single letter, satisfactorily explained to the Supreme Court of the State of Michigan.

The fourth paragraph then cites *Ward* v *Village of Monroeville,* 409 US 57, 93 S Ct 80, (1972).

This was a case wherein defendant was convicted in the mayor's court for two traffic offenses. He appealed to the Court of Common Pleas, the Court of Appeals and the Ohio Supreme Court. Certiorari was granted. The court pointed out that implied bias would be shown by the mayor sitting as a traffic and ordinance judge because:

> "A major part of village income is derived from the fines, forfeitures, costs and fees imposed by him in his mayor's court. Thus in 1964 this income contributed $23,589.50 of the total village revenues of $46,355.38; in 1965 it was $18,508.95 of $46,752.60; in

1966 it was $16,058.00 of $43,585.13; in 1967 it was $20,060.65 of $53,931.43; and in 1968 it was $23,439.42 of $52,995.95. This revenue was of such importance to the village that when legislation threatened its loss, the village retained a management consultant for advice upon the problem." Page 58 of 409 US and Page 82 of 93 Supreme Court Reporter.

The case reversed and the court held that the defendant-petitioner for certiorari was entitled to a neutral and detached judge in the first instance. Reversed and remanded with Mr. Justice White and Mr. Justice Rehnquist dissenting. The dissent pointed out that they could not assume that every mayor-judge would disregard his oath as administrator of justice contrary to constitutional commands, particularly in view of the fact that there were similar statutes in 16 other states. Hence, they would affirm leaving the due process issue on a case-by-case basis.

People v *Coleman*, 350 Mich 268, 86 NW2d 281 (1957), was a conviction for attempting to obstruct justice. Coleman had been charged with the violation of the Small Loan Act. His trial date was set. Before the trial started he attempted to get certain witnesses to inform a witness subpoenaed for the people that this witnesses' wife was ignorant of the fact that he had been "running around" with a young woman. He also attempted to have the intermediary pass certain information on *prior to the trial.* This was conduct of a party making an agreement with an intermediary to influence the testimony. The mere facts of the case distinguish it from the instant *Meshriy* v *Sun Oil. Coleman* was prior to the trial to influence the witnesses. Mason's letter was *after* the trial and simply was a letter to the Chief Justice of the Supreme Court requesting that a decision be made by the trial judge who had heretofore

said in effect that *he did not know which way to rule.* The only effect of Mason's letter was to force the trial judge to render an opinion — either for the plaintiff or for the defendant. Nothing else was involved. Appendix H, Pages 14a-16a.

Page 14 of the Petition cites *Betts* v *Brady*, 316 US 455, 462, 91 S Ct 1252 (1942) was certiorari from the Chief Judge of the Court of Appeals of Maryland denying Habeas Corpus and remanding petitioner to the custody of the warden, respondent Betts. At Page 14 petitioner cites this case and says that "an asserted denial of Federal due process is to be tested by the totality of facts of a given case." On Page 1261 of 62 S Ct the Opinion makes this statement:

"In this case there was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as a perpetrator. The defense was an alibi. Petitioner (who had previously asked for Counsel to be appointed for him which had been denied) called and examined witnesses to prove that he was at another place at the time of the commission of the offense. The simple issue was the veracity of the testimony for the State and that for the defendant. As Judge Bohn says the accused is not helpless, but was a man 43 years old, of ordinary intelligence and ability to take care of his own interests on a trial of that narrow issue. He had once before been in a criminal court, pleaded guilty of larceny and served a sentence and was not wholly unfamiliar with criminal procedure. It is quite clear that in Maryland, if the situation had been otherwise and it had appeared that petitioner was, for any reason, at a serious disadvantage by reason of a lack of counsel a refusal to appoint would have resulted in the reversal of a judgment of conviction."

His petition for Habeas Corpus was denied based upon the totality of the facts set forth. Veracity of plaintiffs' versus defendant witnesses' testimony was the only issue set forth.

Petitioners, Page 14, cites *Morgan* v *US,* 304 US 1, 58 S Ct 773 (1938), was a reversal of an Order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies at the Kansas City Stock Yards. Apparently, the first time the case was before the U.S. Supreme Court in 298 US 468, 56 S Ct 906, there had been struck from plaintiff's bill the allegations that the Secretary had made the order without having heard or read the evidence and that his sole information was derived from consultation with the employees of the Department of Agriculture. That was held error and thereafter the Bills were amended and Interrogatories were directed to the Secretary of Agriculture, Rexford G. Tugwell, as to how he reached his decision. His answer was that the Secretary had read the summary presented by appellant's Brief, conferred with his subordinates who had sifted and analyzed the evidence but had not conducted a full hearing before him. Apparently the purported hearing was before a predecessor cabinet member. The court stated that the right to a hearing embraced not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The Secretary should have informed what the Government proposed and the opposition be heard before the final command as to rates or regulations should be issued. The instant case was before one and the same judge who heard a long and complicated trial consisting of many Exhibits, a multitude of pleadings, Motions, cross-examinations, oral and written arguments, being not able to make up his mind and then finally after

Mason's letter to the Michigan Supreme Court, he then decided for the defendant. In fact, in his Opinion which is found in Petitioners' Appendix B, Pages 8a-11a, he stated:

> "It should be noted that this Court has reviewed the transcripts of the greater part of the testimony offered in this cause prior to the entry of this Opinion. It being conservative to estimate that the transcripts comprise the essential testimony of the various parties and consist of in excess of 500 pages. *A further trial of the cause could result in no more thorough or comprehensive offering of testimony than that before the Court at this time.*" (Emphasis supplied)

Hence, we have the same trial judge, a complete record of the testimony and Exhibits, and the judge's final Opinion upon which the judgment was based. In the *Morgan* case, the Secretary of Agriculture actually did not hear the case. He relied upon only the written record, the Briefs, and the analysis of the evidence given him by his subordinates. This Circuit Judge Frank Jeannette did not do. He did it all himself and reached his own Opinion and Entry of Final Judgment.

Petitioners' Page 15 cites *Wayne County Prosecutor* v *Doerfler,* 14 Mich App 428, 165 NW2d 648 (1968), wherein an obscenity case resulted in, *before trial,* an Affidavit being filed for a change of venue for the trial judge in order to disqualify him stating that he had motivated the community against the sale of obscene literature. This is based upon the Michigan General Court Rules of 1963, No. 405 which is accurately stated on Page 15 of petitioners' application for certiorari. However, again this is irrelevant because this is a motion for a change of venue from the judge before the judge started the trial. Here we have an

attack upon a conscientious trial judge after the trial had been totally completed.

Groopi v *Leslie*, 404 US 496, 92 S Ct 582 (1972), was Habeas Corpus because petitioner was adjudged in contempt of the Wisconsin State Legislature, was served with documents pertaining thereto while sitting in the county jail for a disorderly conduct charge, and was never given an opportunity to present his side of the case with a "minimal right" of defending himself of the charges. This cases differs entirely from the present one before the Court. Here plaintiffs were given an opportunity to cross-examine and did cross-examine the polygraph operator. In addition after the trial they requested the right to cross-examine the Court Administartor and defense counsel, *but have never done so to this date*. Each one of these requests were made when all of these people were availabl, ready, willing and able, and after the total trial had been completed. Thus the case is not applicable.

Ross v *Moffitt*, 417 US 600, 94 S Ct 2437 at 2443 (1974), emphasizes fairness between the State and the individual as quoted therein. This 1974 case before the U.S. Supreme Court involved simply the issue of interpreting *Douglas* v *California* requiring appointment of counsel of indigent State defendants on their first appeal as a right and should it be extended to require counsel for discretionary State appeals and for applications for review in this Court. The fairness between the State and the individual extends not only between the State of Michigan and plaintiffs Meshriy but also extends to fairness between the State of Michigan and the Sun Oil Company and in particular to fairness between the State of Michigan and Walter C. Mason, a person accused of no crime but publicly pilloried as a liar

and a forger. The actual result therefore is that his letter, merely asking for a judgment addressed to the State of Michigan cannot be anything else but a plea that the trial judge render an opinion and a final judgment which would brand witness Mason, not a party, either as a liar and forger or as an innocent man. Even the witness is entitled to his rights. Because he wrote a letter requesting that in all fairness his good name be cleared, it cannot be said that he infringed upon due process.

The statements made by petitioners on Page 14, characterizing "secretly reached the trial judge while the petitioners, unaware and ambushed"; on Page 16, the statement "a trial by ambush undercutting" is a sorry reflection upon the fact that a witness subpoenaed has to undergo such unjust accusations. To require a solution, even though a letter resulted in a solution, cannot be deemed denying plaintiffs of due process.

Davis v *Wechsler*, 263 US 22, 44 S Ct 13 (1923) is cited at Page 16 for the proposition that a Federal right, when plainly and reasonably made, is not to be defeated under the name of local practice. This case is irrelevant because at the very start of the trial, being for personal injuries suffered by plaintiff passenger of the Great Western Railroad when it was under Federal control, resulted in a judgment for defendant because of the fact of a venue order and a procedure adopted by the State setting forth that by Missouri practice the defendant had a right to unite a plea to the jurisdiction and a defense on the merits resulting in the trial never getting off the ground. Mr. Justice Holmes said at Page 14 of 44 S Ct that:

> "Whatever springs the State may set for those who are endeavoring to assert that the State confers, the assertion of Federal rights, when plainly and

reasonably made, is not to be defeated under the name of local practice."

The great difference between the instant case and *Davis* v *Wechsler* is that in the latter case, an asserted defense was deprived before the trial even started. In the instant petition, the Federal question was not only waived, if one existed, but in addition was raised only after the evidence had been completely in, the trial closed and the obvious result had to be for the defendant.

Most of the cases cited by petitioners are prefixed by generalizations. Thus on Page 16 of the Petition, *Angel* v *Bullington*, 330 US 183, 67 S Ct 657 (1946) is cited merely for the proposition that a State cannot interpret a State statute so as to deprive a U.S. District Court from hearing a Federal action. That case involved the North Carolina statute which prohibited deficiencies on account of the purchase price of real property. In the pleadings the claims are based on the U.S. Constitution and the Court held that using the word "jurisdiction" in the statute would be insufficient to bar a Federal question and prevent Bullington from the using the Federal Court if he so desired. With that case respondent heartily agrees but cannot see its relevancy to the instant action.

Cox v *Louisiana*, 379 US 559, 562, 85 S Ct 453 (1965) is cited for the generalization of "the unhindered and untrameled functioning of our courts is part of the very foundation of our constitutional democracy." (At Page 16 of petitioners' Request). *Cox* reversed a conviction of a group of students who assembled peaceably at the State Capitol Building and marched to the courthouse where they sang, prayed and listened to a speech by defendant who was convicted of disturbing the peace and of obstructing public passages in violation of State statutes. Defendant was given

3 cumulative sentences in jail of 4 months plus 5 months plus 1 year as well as total fines of $5,700. The Louisiana Supreme Court affirmed the convictions on the grounds that the disorderly conduct and obstructing use of the public sidewalk by approximately 2,000 students who were orderly, peaceful, sang, prayed and gave a speech, was a constitutional infringement upon the rights of religion and free speech. It is impossible to see the relevancy of this case to the instant situation.

Petitioners Page 16 cite *Titus* v *Wallack*, 306 US 282, 59 S Ct 557 (1939). Respondents agree with the generalization that the asserted federal right when denied by a state court, the sufficiency of the grounds of State denial is for the U.S. Supreme Court to decide. *Titus* was simply a case whether or not a New York State Court judgment was entitled to full faith and credit in Ohio. It was for the U.S. Supreme Court to decide whether or not an assignment existed or there was fraud in procuring the judgment or whether or not the record owner of the judgment was or was not entitled to full faith and credit under the constitutional provision. It decided that only the U.S. Supreme Court (and other federal courts) had the right to decide and it decided for the latter, namely, the record owner of the judgment was entitled to full faith and credit. With that respondents have no quarrel. It simply leads to the question whether or not the letter of Walter C. Mason to the Chief Justice of the Michigan Supreme Court complaining about not being cleared because of the accusations of forgery and being a liar that had made against him would so affect the trial judge so as to require him to hold for the plaintiffs or for the defendants. His opinion indicates that he held for the defendants after he had once indicated that he didn't know which way to hold when the

burden of proof was on the plaintiff-petitioners. This then raises the question: Is there a "substantial" Federal question involved in this petition for certiorari?

Pages 13-14 cites *State* v *Johnson,* 77 Oh St 461, 83 NE 702 (1908) where Johnson under the name Ryan wrote a letter prior to trial to the Common Pleas Court involving a civil suit between himself and one Slater. A comparison of the letter written by Mason (Appendix H, Pages 14A-16A) with the Johnson-Ryan letter shows no attempt to obstruct justice but for witness Mason and his wife, Anna to be found forgerers and perjurers or not.

The Kinnear-Weed Corp v *Humble Oil,* 403 F 2d 437 (1968), raised the issue before trial whether a Federal District Judge or his relatives had a monetary interest in litigation before him. Certainly Judge Jeannette has no financial interest aligned with Meshriy, Sun Oil or the Mason family. His interest was only in the superintending control of the Supreme Court of Michigan over the Circuit Trial bench pursuant to the Michigan Constitution.

II.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT AND DOES NOT RAISE A FEDERAL QUESTION.

Plaintiffs-appellants have limited the scope of their appeal expressly to the presentation of a federal question. However, a federal question as alleged requires more. What it requires is a *substantial* federal question. Precisely what is a substantial federal question, or as it is sometimes stated, and "insubstantial question" or a "frivolous appeal"?

The standards or guides which a court may use to determine whether there is a substantial federal question presented so that certiorari should be granted is very similar to whether or not there is a question of great moment influencing state-wide jurisprudence, thereby making analogous the Application for Leave to Appeal with the definition of a substantial federal question.

A "substantial" question would be one against a federal right which had never been foreclosed but it would be insubstantial and frivolous if it had been previously decided. Hence, Wright, Charles Allen, "Law of Federal Courts" at Pages 483 and 484 sets the following standards as being required:

1. Raising the question in the lower courts. This was done but not timely in this particular case. This was only after the trial was concluded and apparently more than fourteen months thereafter and then only when the decision was adverse to plaintiff;
2. It must be a final judgment. This is an Application for Certiorari from a final judgment without a doubt instead of being a piece-meal review;
3. An insubstantial federal question or, by analogy, the meritorious Application for a Petition For Ceriorari must be of general state-wide jurisprudence and also of federal-wide jurisprudence. This would be a situation wherein (a) there is a conflict of decisions between the intermediate appellate courts which should be resolved for the guidance of the entire judiciary; (b) the important question had never been decided before. If decided before then, even though a federal question, it would not be considered substantial.

That is precisely the case here.

Defendant's counsel very carefully pointed out to the trial judge as to the use of the polygraph examinations, that this matter had been previously decided by the late

Honorable Macomb Circuit Judge James Spier in the case of *Stone* v *Earp*, 331 Mich 606 (1951), a civil action in chancery for determination of title to a dump truck and trailer. Judge Spier suggested that he wanted lie detector tests before deciding the issues. A Stipulation was entered that each party would voluntarily submit to the polygraph test. Mr. Gregory administered the test and formed his opinion. The trial court held for the defendant which was consistent with Mr. Gergory's opinion, and Judge Spier further said:

> "The polygraph tests were a definite aid to the court in this case, in supporting what appeared to be the preponderance of the evidence, and in removing doubt in the court's mind as to the possibility of fraud owing to the fact that all of defendant's three witnesses to the payment were his own immediate family."

Plaintiff's Appeal urged that it was error to give consideration and weight to the opinion of the polygraph operator. Mr. Justice Sharpe said at Pages 610 and 611 of 331 Mich that:

> "We are not unmindful of the fact that at the direction of the trial court, the parties agreed to submit to the tests, but whether by voluntary agreement, court direction or coercion, the results of such tests do not attain the stature of competent evidence, in that the preponderance of evidence was in defendant's favor prior to the admission of such tests. This is only another way of stating that plaintiff had not maintained the burden of proof. In all civil cases, whether in law or chancery, the burden of proof is upon the claimant. Under the circumstances of this case the admission of the result of the tests in evidence, while error, was not prejudicial for reasons heretofore stated."

This is precisely the case in the instant case. It simply amounted to the judge when he first said he couldn't make up his mind, he then made a decision after the letter from Mr. Mason. However, it must be remembered that at the same time, the opinion of the Michigan Court of Appeals said that two of the three issues raised by plaintiff-appellants were abandoned because not briefed. This raised only the question remaining in the case, namely, whether a letter of Mr. Mason's (a witness and not a party to the case), influenced the judge after the evidence was in and he said he could not make up his mind. This certainly is not a question of great jurisprudence to the entire state of Michigan or of the United States, but is frivolous and insubstantial.

There is very little actually written as to the substantial federal question issue. A long and most difficult article, of which the above short statement is a summary, written by Ulman and Spears "Dismissed for Want of A Substantial Federal Question". 20 Boston University Law Review 501-531 plus a note entitled "The Insubstantial Federal Question" appears in 62 Harvard Law Review 488-496.

Hence, judged by the sole and remaining issue in the case, the first two issues not having been preserved by the plaintiffs-appellants in their Brief in the Michigan Court of Appeals, therefore, the only issue from which they can appeal is wholly that a letter from Walter Mason to the Chief Justice of the Michigan Supreme Court complaining of the long delay in rendering a decision in order to clear his name and his wife's name from being designated forgers and liars could arise to the dignity of a federal question which had any merit. If anything, it was simply a finding as to whether or not the plaintiffs had sustained the burden of proof which clearly had not

been done. The State Courts' decisions are sustainable solely on matters of local law, in dependently of the federal constitutional question.

CONCLUSION

Respondent requests that this Court deny petitioners' request for certiorari. In particular because of the long delay occasioned by the demand for cross-examination and the necessity of defendant's counsel's preparation of various Orders even though adverse to his side; that attorney's fees and total court costs including increasing the $175 award of costs by the trial court should be ordered amended for purposes of being taxed.

Respectfully submitted,
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